No. 3947

IN THE

# United States Circuit Court of Appeals for the Ninth Circuit

JANUARY TERM, 1923

J. BILBOA and WILLIAM BORDA,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.



# Brief of Defendant In Error

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## BRIEF OF DEFENDANT IN ERROR

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As nearly as may be, defendant in error will follow the plan of the brief of plaintiffs in error.

### I.

Plaintiffs in error argue first that the "entire evidence submitted was insufficient to sustain the conviction of these defendants or

either of them on any charge."

There was no motion by plaintiffs in error for a directed verdict. There were no objections, and no exceptions. Hence, if there is any evidence at all upon which the verdict can be sustained, this Court will not review the sufficiency of the evidence. See:

Williams vs. U. S. 282 Federal 481, 483.
Nosowitz vs. U. S. 282 Federal 575.

There is ample evidence in the record to sustain the verdicts against both defendants. To summarize a part of the evidence: Three officers testified that when they entered the soft-drink establishment where defendants were arrested about midnight, defendant Borda was behind the bar serving two men who were at the bar about to take a drink from filled glasses in their hands. They had placed money on the bar. As the officers rushed in, the liquor was spilled on the bar, one of the men drinking ran away, and the officers said that judging from appearance and smell the liquor in one glass,—an ordinary wine glass, —was red wine, in another glass,—a whiskey glass,—was corn-whiskey, and that a "chaser" of water was in a third glass. On the drainboard back of the bar was a wine bottle partly filled with wine, which analyzed 16.52 per cent. alcohol, and in a rubber shoe back of the bar was a flask of corn whisky containing an alcoholic content 42.12 per cent. Defendant Borda when arrested said he was the bartend-

er, and that the proprietor, defendant Bilboa, had gone upstairs to bed at eleven o'clock. Defendant Borda immediately took one of the officers to defendant Bilboa's room. Defendant Bilboa dressed, went downstairs to the bar-room, admitted he was the proprietor and employer of defendant Borda, bartender, and when charged with the crime did not deny knowledge of the acts of defendant Borda, nor of the presence of the intoxicants in his premises. On the witness stand, both defendants again admitted that defendant Bilboa had been in the bar-room until about eleven o'clock, that he then went to bed upstairs, that he was proprietor and employer of defendant Borda, bartender, and that when charged with the crime he did not deny knowledge of the acts of defendant Borda, nor of the presence of the intoxicants in his premises. Defendant Bilboa said his bar-room was open daily from six o'clock mornings until one o'clock next mornings. See transcript pp. 68, 69, 70, 72, 74, 77, 78, 91, 95, 96, 99, 102, 106, 116, 117, 119, 120, 121, 122, 123, 124, 126, 127, and 128.

It is believed, therefore, that there is an abundance of evidence to warrant the conviction of the defendant Borda on the sale count, and of the defendant Bilboa on both possession and sale counts.

## II.

Plaintiffs in error suggest that defendant

Bilboa can be held responsible for the sale by his bartender, defendant Borda, only on the theory of express or implied authority to the latter, who did the selling.

But Section 332 of the Federal Criminal Code makes anyone a principal who aids, abets, counsels, commands, induces or procures the commission of a crime. The section reads:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal."

Certainly, the defendant Bilboa aided and abetted the offense, for he admitted ownership of the premises and of the wine and whiskey glasses, employment of defendant Borda, who sold the intoxicants, keeping the place open from six o'clock mornings until one o'clock next mornings, and being present in the bar-room until eleven o'clock on the night of the raid.

It is believed further, that even on the doctrine of express or implied authority to an agent, eliminating Section 332 F.C.C. from consideration, the facts sustain the verdict against defendant Bilboa. Plaintiffs cite Nobile vs. U.S. 284 Fed. 253 as an authority, and they quote from it at length, but they omit to quote the instruction approved by the Cir-

cuit Court as a "correct exposition of the law". That instruction reads:

> "So and so has sold this hat, this coat, this suit. Of course in the case of a man doing an illegal business, you must be satisfied that it is his business which is being conducted by another, because there is no presumption that an agent is carrying along the illegal business of his employer; but, if the evidence shows that the employer is carrying on the illegal business, it is not necessary that he be actually there every hour of the day selling stuff, if it is his business and you are satisfied beyond a reasonable doubt that it is being carried on by him through another, just as in the case of a lawful business."

See also:

Albert vs. U. S. 281 F. 511, 513.
Wiggins vs. U. S. 272 F. 41, 45.

This Court held in the case of Young vs. United States, 272 Fed. 967 that under facts almost exactly the same as in the instant case, both the proprietor and bar-tender were properly found guilty on a nuisance count.

Plaintiffs in error cite McWhorter vs. U. S. 281 Fed. 119, as authority for the proposition that declarations of third persons cannot be introduced in evidence against the defendant. But plaintiff in error Bilboa made no objec-

tion at the trial to the introduction of plaintiff in error Borda's statement that Bilboa was proprietor and employer, and Borda the barkeeper. The McWhorter case is not disputed; on the contrary, it is cited as an authority for the admission in evidence, without objection or exception, of the statements made by both plaintiffs in error, as a part of the res gestae. The Court in the McWhorter case said:

> "In the trial of a criminal case, acts and declarations of a third party at the time of the commission of an offense charged, or substantially coincident therewith, may be introduced in evidence as part of the res gestae, upon the theory that acts and words so closely connected with the main fact as to really constitute a part thereof, are necessary to a proper understanding of the main transaction."

The fact of agency may be established by circumstantial evidence. The summary of evidence given at the beginning of this brief shows an abundance of such circumstances, and in addition the admissions of the defendant Bilboa. See:

> "Circumstantial evidence is ordinarily competent to establish the fact or extent of an agency. Where such evidence is resorted to for the purpose of establishing agency, all the facts and circumstances showing the relation of the parties, and their treatment of each other, and throw-

ing light upon the character of such relation, are admissible in evidence."
Turner et al vs. Yates, 57 U. S. 14, L. Ed. 484.

"The defendant made statements to other officers admitting ownership of the liquors and his desire to keep the liquors which had been seized. The admissions of the defendant, made voluntarily, and not impeached as having been made involuntarily, are strong evidence of the truth of what they purport to say."

Wiggins vs. U. S., 272 Fed. 41, 43.

Accordingly, it is respectfully suggested that the theory, in effect, that plaintiff in error Bilboa should not have been convicted of the sale count because he was not caught in the act of selling, is unsound.

## III.

Plaintiffs in error assert there is no substantial evidence as to the contents of the glasses, which the men drinking at the bar had in their hands as the officers raided the premises. The officers, all qualified as experts, testified that red wine was in one glass; it looked and smelled like wine; that corn-whiskey was in another glass; it looked like corn-whiskey and smelled alcoholic. Wine and corn-whiskey which on analyses showed high

alcoholic content were on the drain board back of the bar. One of the men ran away. Is not that substantial evidence?

This Court does not require argument addressed to the point that an analysis for alcoholic content is not necessary. See:

Strada vs. U. S. 281 Fed. 143.
Albert vs. U. S. 281 Fed. 511, 513.
Rose vs. U. S. 274 Fed. 245, 247.
Singer vs. U. S. 278 Fed. 415, 418.
Lewisohn v. U. S. 278 Fed. 421, 425.

## IV.

Plaintiffs in error argue that their acquittal on the nuisance count makes improper their conviction on the sale count. But there is no inconsistency in such verdicts. A nuisance contains elements in addition to the mere possessing, or the mere selling, or both. For instance, a man might be found guilty of possessing or selling in the lobby of a hotel which is owned and conducted by someone else; as he does not own or conduct the lobby, he cannot be held for maintaining a nuisance there. So in the instant case the jury might have found that the defendants did not conduct a nuisance at the place, even though liquor was sold there; a single sale may or may not constitute a nuisance.

Wherever a count on which there has been

an acquittal contains an additional or different necessary ingredient to constitute the offense than the ingredients of the count on which there has been conviction, there is no inconsistency. Thus, in Lowenthal vs. United States, 274 Fed. 563, a verdict of not guilty on a count for unlawfully purchasing narcotics was not inconsistent with a verdict of guilty on a sale count. The situation in the instant case is very nearly the same. The same principle is involved as in the case of Millich vs. U. S. 282 Fed. 605, cited by plaintiff in error. Williams vs. United States, 282 Fed. 481, 483, a Mann Act case, cited by plaintiffs in error, is readily distinguishable. Said the Court:

> "However strong the testimony may tend to establish the alleged acts of immorality*****it utterly fails to establish against Williams the offense of persuading, inducing, enticing and coercing Maude McAbee to make the trip in interstate commerce*****"
>
> See also: Baldini vs. U. S. decided in this court January 22, 1923.
> Com. vs. Lowry (Mass) 34 N. E. 81.

Plaintiffs in error cite Nosowitz vs. United States, 282 Fed. 575, Isbell vs. United States Fed. 778 and Wierner vs. United States, 282 Fed. in support of the proposition that the evidence does not warrant conviction of the plaintiffs in error.

The argument is merely a continuation of the beginning of the brief of plaintiffs in error, our reply to which, in substance, was that there was ample evidence in the record to support conviction, that there had been no objections, no exceptions, and no motions for a directed verdict. The argument of plaintiffs in error goes to the weight of evidence and was for the trial jury; it has no place in this Court. For, it is the rule of law that "This court has no power to determine the weight of the evidence". (Rose vs. United States, 274 Fed. 245 at 247.) See Waddell vs. U. S. 283 Fed. 409. And Section 1011 Revised Statutes of the United States expressly provides:

> "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error*****for any error in fact."

The language of the dissenting judge in Chicco vs. United States, 284 Fed. 434 at 438, —a case which differs from the instant case in that in it there was a motion for a directed verdict,—is appropriate here:

> "Appellate courts should exercise great caution in setting aside convictions for lack of evidence. The drama of the trial cannot be re-enacted in the appellate court. Evidence which appears light here may have been made truly weighty by its setting. The manner of the defendant and his witnesses, their silence or their

denials in connection with other circumstances, may be as convincing as positive testimony."

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It is urged that for the reasons stated the judgment should be affirmed.

Respectfully submitted,

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Dated: Reno, Nevada, January 31, 1923.